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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CONDITIONAL CROSS-PETITION OF THE MID-SIZED LOCAL EXCHANGE CARRIERS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act"), establishes distinct methods for companies without local network facilities of their own to enter an incumbent local telephone company's market and compete for its customers. First, the Act requires incumbent local telephone companies to offer their retail telephone services for sale on a wholesale basis, so that new entrants can resell those services. *See* 47 U.S.C. § 251(c)(4). Second, for new entrants with some local network facilities of their own, the Act requires incumbents to make available *pieces* of their existing networks, known as unbundled network elements, so that entrants can fill in the gaps in their facilities. *See* 47 U.S.C. § 251(c)(3). Moreover, the Act also establishes distinct pricing standards for each mode of entry. For resale competition, the Act requires incumbents to sell retail services at a wholesale discount from the retail rate. *See* 47 U.S.C. § 252(d)(3). For facilities-based competition, the Act requires incumbents to sell individual elements of their physical networks on an unbundled basis at the incumbents' cost of providing those elements, plus a reasonable profit. *See* 47 U.S.C. § 252(d)(1).

The questions presented in this conditional cross-petition – which is conditioned on a grant of certiorari by the Court on Question 2 in the petition of the Federal Communications Commission ("FCC") in No. 97-831 – are whether the FCC violated the Act's express distinction between resale and unbundled network elements, and particularly the distinct pricing standards applicable to those modes of entry, by requiring incumbent telephone companies:

> (1) to provide competitors without *any* network facilities access to *all* the network elements necessary to provide retail service, not at the Act's wholesale discount rate for resale, but at the cost-based rate reserved for competitors with some of their own facilities that purchase access to individual network elements from incumbents; and

(2) to sell as unbundled network elements under section 251(c)(3) software systems used for business functions (such as billing), as well as services (such as operator services, caller ID and call forwarding) that are also available for resale under section 251(c)(4).

LIST OF PARTIES AND AFFILIATES

Aliant Communications Company is a wholly owned subsidiary of Aliant Communications Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

ALLTEL Telephone Services Corporation is a wholly owned subsidiary of ALLTEL Corporation, a publicly traded company. It has no non-wholly owned subsidiaries, but does have investment interests in the following publicly traded companies: Applied Global Internet, Champaign Telephone, Conestoga Telephone, Conneaut Telephone, Horizon Telecom, Inc., SPRINT and WorldCom, Inc.

Cincinnati Bell Telephone Company is a wholly owned subsidiary of Cincinnati Bell Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

The Concord Telephone Company is a wholly owned subsidiary of CT Communications, Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

North State Telephone Company is a wholly owned subsidiary of North State Telecommunications Corporation, which is not a publicly traded company. It has no non-wholly owned subsidiaries.

Pacific Telecom, Inc. is a wholly owned subsidiary of Century Telephone Enterprises, Inc., a publicly traded company. Pacific Telecom, Inc. has the following non-wholly owned subsidiaries: Gem State Utilities Corporation; Northwestern Telecom Systems, Inc.; Pacific Telecom Cable, Inc.; and STU Partnership.

Rock Hill Telephone Company has no parents or non-wholly owned subsidiaries.

Roseville Telephone Company is a wholly owned subsidiary of Roseville Communications Company. With regard to non-wholly owned subsidiaries, Roseville Telephone Company holds a minority equity interest in the

Sacramento Valley Limited Partnership and a majority equity interest in West Coast PCS LLC.

The Southern New England Telephone Company ("SNET") is a wholly owned subsidiary of Southern New England Telecommunications Corporation, a publicly traded company. SNET has no other parents, non-wholly owned subsidiaries or affiliates that issued stock or debt securities to the public.

The Independent Telephone & Telecommunications Alliance ("ITTA") is a non-profit trade association representing 15 mid-sized independent telephone companies providing local exchange and exchange access telephone service in 41 states. ITTA has no parent companies or subsidiaries.

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The Southern New England Telephone Company, Aliant Communications Co., ALLTEL Telephone Services Corp., Cincinnati Bell Telephone Co., The Concord Telephone Co., North State Telephone Co., Pacific Telecom, Inc., Rock Hill Telephone Co., Roseville Telephone Co., and the Independent Telephone & Telecommunications Alliance bring this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. Each of the individual companies is an incumbent

local exchange carrier ("LEC"), as that term is defined in 47 U.S.C. §§ 153(26) and 251(h)(1), as added by the Telecommunications Act of 1996 ("Act"). The nine companies actively participated as petitioners and intervenors in the briefing and argument before the United States Court of Appeals for the Eighth Circuit and were collectively referred to as the "Mid-Sized LECs." In contrast to the "large LECs," *i.e.*, the Bell Operating Companies ("BOCs") and GTE Service Corporation ("GTE"), each of the Mid-Sized LECs individually controls fewer than two percent of the nation's telephone lines. *See* 47 U.S.C. § 251(f)(2). The Independent Telephone and Telecommunications Alliance is a non-profit trade association representing 15 mid-sized LECs providing local exchange and exchange access telephone service in 41 states.

The Mid-Sized LECs have endeavored in this cross-petition to avoid repetition of all of the arguments set forth in the conditional cross-petitions of GTE and the BOCs, which arguments the Mid-Sized LECs fully support and incorporate by reference in this cross-petition.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC* (Pet. App. 1a-67a)[1] is reported at 120 F.3d 753. The court of appeals' order on rehearing, which amended its opinion (Pet. App. 69a-72a), is not yet reported. The FCC's First Report and Order is reported at 11 FCC Rcd. 15499 (1996), and relevant excerpts are set forth in Pet. App. 131a-337a.

JURISDICTION

The court of appeals had jurisdiction to review the FCC's First Report and Order pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The court of appeals issued its initial

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *AT&T Corp. et al. v. Iowa Utilities Board et al.*, No. 97-826.

decision on July 18, 1997 and issued its decision on rehearing on October 14, 1997. This Court has jurisdiction to review the court of appeals' judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), which amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, and rules promulgated by the FCC under the Act in the rulemaking proceeding styled *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 8, 1996). Relevant portions of the statutes and rules are reproduced in the Pet. App.

STATEMENT

There is no disagreement that the Telecommunications Act of 1996 establishes distinct modes for opening local telephone markets to competition from new entrants that lack some or all of the network facilities needed to provide local service – the use of unbundled elements of the incumbent's network, or resale. Pet. App. 137a [Order ¶ 12].[2] Nor is there any disagreement that the Act establishes distinct pricing standards for these different methods of competitive entry, standards reflecting the different risks and rewards of the respective modes. Thus, new entrants seeking to compete with an incumbent LEC by purchasing retail telephone service from the incumbent and reselling it must pay the incumbent a wholesale rate to buy that service. To encourage facilities-based competition, however, the Act also allows new entrants seeking to compete through the use of their own, albeit incomplete, network facilities, to fill in the gaps in those facilities by purchasing, at cost-based rates, discrete elements from an

[2] The Act also permits a new entrant that has constructed its own network to "interconnect" with the incumbent LEC "for the transmission and routing" of traffic between the two networks. 47 U.S.C. § 251(c)(2).

incumbent's network, known as unbundled network elements ("UNEs").[3]

In implementing the Act, the FCC promulgated a set of rules that eviscerated the distinction between competition through resale and competition through the purchase of UNEs. Thus, the FCC's rules not only enabled new entrants to purchase an incumbent's retail telephone service at a wholesale discount, but also to purchase, at significantly lower cost-based rates, the full array of network elements needed to provide that very same retail service – not just the discrete elements of the incumbent's network required to fill in the gaps in the new entrant's facilities. Moreover, the rules required incumbents to provide the full array of network elements on an already-combined, rather than unbundled, basis.

Recognizing that the FCC's rules would "obliterate" the clear statutory distinctions between purchasing network elements and reselling services, and would thus undermine Congress's goal of promoting facilities-based competition, the Eighth Circuit invalidated the rules that would have required incumbents to provide network elements to new entrants on an already-combined basis. Instead, the court properly construed the Act to require new entrants to bear the risk and cost of combining network elements purchased from the incumbent on an unbundled basis. Pet. App. 52a-53a, 71a. The court concluded that by requiring new entrants to bear this burden – which was fully consistent with the plain language of the Act

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[3] There is no question that the drafters of the Act sought to encourage facilities-based competition. As one member who later sat on the Conference Committee put it, "it is no exaggeration to say that the entire bill is premised on the existence of robust facilities-based competition." Hearings before House Subcomm. on Telecommunications & Finance of the House Comm. on Commerce, 104th Cong., Serial No. 104-34, at 9 (1995); *see also* 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (the Act is intended to "give[] new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company").

– the critical distinction in the Act between resale and UNE-based competition would be preserved.

Question 2 of the FCC's petition narrowly challenges the court of appeals' determination that the Act does not require incumbents to provide UNEs to new entrants on an already-combined basis.[4] In posing such a narrow challenge, however, the FCC has completely ignored the FCC rule requiring incumbents to provide new entrants access to all, rather than just some, of the network elements that an incumbent uses to provide retail service. Pet. App. 245a-246a. This rule allows new entrants to duplicate the incumbent's retail telephone service without assuming the burden of building, operating and maintaining *any* network facilities of their own, and without paying the higher wholesale rate for the incumbent's retail service. The court of appeals allowed this rule to stand, but only because it had struck down the rules requiring incumbents to provide UNEs to new entrants on an already-combined, rather than unbundled, basis. The court concluded that by invalidating the rules requiring incumbents to combine elements for new entrants, competition through resale and through the purchase of UNEs would remain distinct for two reasons. First, new entrants seeking to compete through the purchase of UNEs would be required to bear the cost and risk of physically combining the network elements themselves. Second, new entrants competing on such a basis would, according to the court, have to make an up-front investment to pay for required network elements, whereas a new entrant seeking to compete through resale could simply purchase services for resale on demand, on a unit-by-unit basis. The court concluded that the requirement of an up-front investment for competing through the purchase of UNEs entailed another risk that was not associated with resale. Pet. App. 52a-53a, 56a-58a, 70a-71a.

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[4] The same narrow issue is also raised as Question 2 in AT&T's petition (No. 97-826) and as Question 1 in MCI's petition (No. 97-829). The ALTS petition (No. 97-830) does not challenge this aspect of the Eighth Circuit's decision.

In short, the Eighth Circuit's decision to vacate the FCC's rule requiring incumbents to provide new entrants with all of the network elements used to provide retail telephone service on an already-combined basis was an integral part of its decision to uphold the FCC's rule requiring incumbents to provide new entrants access to all, rather than just some, of the network elements they use to provide retail service. Nevertheless, the FCC's petition asks this Court artificially to restrict its review to the former decision and to ignore the latter. Given the integrated nature of the Eighth Circuit's decisions, granting review limited to the issue presented as Question 2 in the FCC's petition would be fundamentally unfair. It would also bring before the Court only one facet of the court of appeals' harmonized construction of a set of provisions in the Act that the court properly recognized were part of a seamless statutory web. Accordingly, if this Court grants review on the FCC's Question 2, it should also review the other aspects of the court of appeals' decision that are inextricably bound up with that question.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

At the outset, the Mid-Sized LECs reiterate the position in their brief in opposition to the FCC's petition that the decision of the Eighth Circuit does not merit review by the Court. The court of appeals recognized that it was required to uphold FCC rules that were consistent with the plain meaning of the Act or that reasonably applied ambiguous legislative mandates. Pet. App. 8a (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984)). The court applied this standard in construing the plain language of 47 U.S.C. § 251(c)(3), which requires LECs to provide "unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." Pet. App. 70a (quoting 47 U.S.C. § 251(c)(3) (emphasis added by Eighth Circuit)). The court properly concluded that the Act imposed upon "requesting carriers," *i.e.*, new entrants, the burden of recombining discrete network elements purchased from

incumbents on an unbundled basis. Consequently, the court concluded that the FCC's rule requiring incumbents to provide new entrants with access to network elements on an already-combined basis was contrary to the plain language of the Act and could not stand. Nothing about the court's straightforward application of the Act warrants the exercise of review by this Court.

Nevertheless, if the Court decides to review the FCC's challenge to the court's ruling requiring new entrants to bear the burden of combining UNEs, it should not consider that issue in isolation. The court expressly conditioned its ruling that an incumbent must provide a new entrant with access to the entire array of network elements required to provide retail telephone service – at the cost-based prices reserved in the Act for unbundled network elements – upon the specific ruling that the FCC asks this Court to review in its Question 2. Thus, while the FCC's petition seeks to present an oversimplified picture of a single issue of statutory construction, the situation is, as the Eighth Circuit recognized, far more complex and resolution of the issue presented by the FCC necessarily requires the Court to consider the court of appeals' efforts to harmonize a series of inter-related provisions of the Act. Consequently, if the Court grants certiorari on the second question raised by the FCC and reviews the court of appeals' ruling on Rule 51.315(b), the Court should grant this conditional cross-petition as well to ensure that the full scope of the lower court's unbundling decision is properly before the Court.

A. As set forth above, the Act provides for distinct methods of entry into an incumbent's market. One mode is for new entrants who lack any facilities to purchase the incumbent's retail telephone service at a wholesale discount and then resell it. New entrants with some facilities of their own may choose instead to purchase from an incumbent, at cost-based rates, the unbundled network elements necessary to fill in the gaps in their own facilities. The FCC's rules on UNEs, however, permit new entrants who lack *any* facilities to purchase *all* of the network elements necessary to provide retail telephone

service on an already-combined basis and at cost-based rates. The Eighth Circuit correctly recognized that these rules, in conjunction, "would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services on the other." Pet App. 71a. It thus struck down the FCC's rule – 51.315(b) – requiring incumbents to provide new entrants with already-combined network elements and, consistent with the plain language of section 251(c)(3), the court required new entrants to shoulder the burden of combining UNEs acquired from an incumbent. The court concluded that the costs and risks associated with that burden would ensure that the Act's careful distinction between competition through resale and through the purchase of UNEs remains meaningful.

If Rule 51.315(b) is resurrected and new entrants are permitted to obtain network elements on an already-combined, rather than unbundled, basis, the distinction that the Act draws between resale and UNEs would once again become meaningless. The Act's legislative history confirms that Congress never intended that incumbents would be required to provide new entrants with access to all of the elements used to provide retail telephone service, or that incumbents would also be required to provide those elements on an already-combined basis at cost-based rates. Rather, Congress intended through the provisions on unbundled network elements to provide a way for facilities-based competitors to supplement their own existing networks. Legislators thus drew a sharp distinction between a "competitor offering services exclusively through resale" of an incumbent's services and one having some facilities in place. Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-438, S. Rep. No. 104-230, at 148 (1996), *reprinted in part in* 1996 U.S.C.C.A.N. 124.

The evisceration of Congress's careful distinction between resale and purchase of UNEs is of particular concern to the Mid-Sized LECs. Mid-Sized LECs' vulnerability to the

distortions inherent in the FCC's rules is significantly greater than that faced by larger LECs because typically a greater proportion of Mid-Sized LECs' revenues are derived from relatively few larger customers. Therefore, they could not withstand the economic calamity of new entrants picking off their large-volume business customers by offering telephone service using the LECs' own pre-existing combination of network elements priced at cost, rather than at a wholesale discount from the higher retail rate that state commissions have required LECs to charge business customers in order to support residential service. The Eighth Circuit was therefore correct to ensure that the FCC's rules, taken as an integrated whole, preserve the Act's purposeful distinction between the sale of unbundled network elements at cost-based prices and the sale of an incumbent LEC's telephone services at wholesale prices. Only by preserving that distinction was the court of appeals able to uphold Congress's intent that incumbent LECs not "lose all of the customers to whom they charge higher prices in order to fulfill their current universal service obligations." Pet. App. 57a.[5]

In sum, the court of appeals conditioned its decision upholding the FCC rule granting new entrants access to the full array of network elements required to provide retail telephone service upon its invalidation of the rule requiring incumbents to provide such access on an already-combined basis. In this way, the court recognized and affirmed what the FCC's rules

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[5] The House specifically amended its bill going into Conference to ensure that LECs need only provide resale at "wholesale rates" rather than "at economically feasible rates to the reseller." *Compare* 141 Cong. Rec. H8426 (§ 242(a)(3)) (daily ed. Aug. 4, 1995) *with id.* at H8444, col. 2 ("resale" amendment). Representative Dingell explained that the amendment was necessary to eliminate the requirement that "local telephone companies . . . subsidize the long distance competitors," by "requir[ing] service which cost $25 to be sold to AT&T for $6; something which would have caused the necessity of subsidizing, then, AT&T at the expense of small business and local [residential] phone user, an outrageous situation." *Id.* at H8452 (also noting that Reps. Bliley and Fields worked to correct "this failure" in the bill).

had rendered a nullity – the critical statutory distinction between competition through resale and through the purchase of UNEs. Under such circumstances, it would be fundamentally unfair for this Court to review only one narrow piece of the court of appeals' multi-faceted and integrated decision regarding UNEs. Such limited review would also raise the potential that this Court's decision would result in an incoherent construction of the Act. Thus, if the Court decides to grant certiorari to consider the terms and conditions of furnishing network elements under section 251(c)(3), it should also review the FCC's decision allowing competitors to purchase the full array of network elements used to provide finished telephone service.

B. If this Court decides to review the FCC's rule regarding the responsibility of incumbents to provide network elements on an already-combined basis, it should also address the FCC's rules – upheld by the court of appeals – requiring incumbents to provide unbundled access to software systems used for business functions (such as billing), as well as to certain of their vertical telecommunications services (such as operator services, call forwarding and call waiting), on the ground that those systems and services are really "network elements." The FCC's rewriting of the Act's definition of "network element" to include retail telephone services is a critical part of the agency's effort to eviscerate the distinction between competition through resale and through the purchase of UNEs, a distinction that lies at the heart of the issue presented in Question 2 in the FCC's petition.

The Act expressly distinguishes telecommunications services from the elements of a network that enable an incumbent to provide retail telecommunications service. The Act defines telecommunications "service" as the "offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). By contrast, a "network element" is defined as a "facility or equipment used in the provision of a telecommunications service," including the "features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). The terms "facility or

equipment" make it clear that an "element" is a physical piece of hardware. Moreover, this "network element" must be a part of the "network" – that is, it must be a part of the network of lines and other facilities used in transmitting a telephone call. While the definition of elements extends to certain "features, functions, and capabilities" that may not in themselves be pieces of equipment, it is plainly limited to "features, functions and capabilities that are provided *by means of such facility or equipment.*" The definition thus remains rooted in physical parts of the call-routing network.

The FCC's interpretation of the Act, however, reflects a different view of what constitutes a network element than Congress ever intended. Emphasizing that the Act defined a telecommunications service as the "offering of telecommunications for a fee directly to the public," the FCC reasoned that virtually anything an incumbent LEC used in operating its business played a part in such "offering" of telecommunications, and thus that the term "network element" was not restricted to parts of the network. *See* Pet. App. 42a-43a.

Accepting the FCC's logic, the court of appeals upheld the FCC's rules that new entrants could obtain access to typically proprietary software systems known as operations support systems ("OSS") that LECs have developed for a myriad of functions in running their own businesses. These systems have no role in transmitting a call over the network. Instead, they are background systems that LECs have developed to run their own business operations more efficiently. They are typically used in managing billing functions or in connection with customer service – *e.g.*, in recording and automatically routing service requests to appropriate service personnel. Nothing in the Act, however, suggests that Congress intended, through its definition of "network elements," to give entrants such pervasive use of the systems incumbents have developed for running their own businesses.

The FCC's unjustifiable view of "network elements" also led it (and the court of appeals) to conclude that new entrants could gain access to other vertical telecommunications serv-

ices, such as operator assistance, call forwarding, call waiting and caller I.D. – which all parties agreed are subject to the resale provisions of the Act (*see* Pet. App. 45a n.29) – at the cost-based rates applicable to the purchase of UNEs. Pet. App. 45a ("a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale.") On this view, then, vertical services constitute *both* telecommunications services (sold at the retail rate less the wholesale discount) *and* a "facility or equipment used in the provision of a telecommunications service" (available at cost-based rates). *Compare* 47 U.S.C. § 251(c)(4) *with* 47 U.S.C. §§ 251(c)(3), 153(29). This holding is particularly significant because state utility regulators set higher retail rates for vertical services to support lower prices for other services, a rate structure on which Mid-Sized LECs are particularly reliant. Thus, cost-based rates for vertical services are substantially lower than the resale rate determined in accordance with the Act. The FCC's rule making cost-based pricing schemes available for vertical services effectively renders the Act's resale pricing provisions irrelevant for these services.

It is implausible that Congress wanted the same retail telecommunications services to be available to incumbent LECs' competitors at two different prices, particularly where the resale rate – which clearly applies – would be nullified. Rather than considering the practical consequences of such an approach, however, the FCC simply determined that some LEC operations might qualify as network elements regardless of whether they also could be labeled "telecommunications services." Pet. App. 42a-43a. Vertical services, however, are not facilities or equipment "used in the provision of a telecommunications service" – they *are* telecommunications services in their own right. As such, they cannot also be network elements. By definition, network elements and retail services are different, and it is upon that difference that the discrete statutory schemes for competition through resale and through the purchase of UNEs depend.

In sum, the FCC's expansive definition of network elements not only conflicts with the plain terms of the Act, it also plays a critical role in transforming access to network elements from an avenue for new entrants to obtain selected pieces of an incumbent's network to fill the gaps in their own facilities into a complete substitute for purchasing service for resale. The FCC's definition thus undermines the critical distinction in the Act between resale and UNE-based competition by requiring incumbents to provide new entrants, at cost-based rates, everything they need to offer retail telephone service, including even the incumbent's own proprietary business management software systems.

C. As shown above, the Court cannot fairly and justly consider the Eighth Circuit's decision on the FCC's rule requiring incumbent LECs to provide access to network elements on an already-combined basis without also considering the court's decisions on the other integral aspects of the FCC's rules on incumbent LECs' obligations to provide new entrants with "access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). When viewed collectively and as an integrated whole, the court of appeals' decisions concerning these rules do not warrant review by this Court. As cross-petitioners stated in their brief in opposition to the FCC's and other petitioners' petitions for certiorari, the court of appeals reached its decision only after carefully considering the concerns and extensive arguments from hundreds of petitioners, respondents and intervenors; after more than six hours of oral argument; and after seven months of deliberation. The result was a detailed, thoughtful and balanced opinion that does not warrant review by this Court, even though it may not please either petitioners or cross-petitioners in every respect.

CONCLUSION

By invalidating the FCC's rule requiring incumbents to provide new entrants with access to the full array of network elements necessary to provide retail telephone service on an already-combined basis, the Eighth Circuit recognized and preserved the critical distinction in the Act between facilities-based competition and resale. That decision does not merit review by this Court for it involved nothing more than the straightforward interpretation of the plain language of the Act, which placed the burden of recombining unbundled network elements not on incumbent LECs, but upon new entrants. In any event, the Court should not even consider reviewing the above decision without also reviewing the questions presented in this conditional cross-petition, for only by reviewing these questions together can the Court ensure that it has before it all of the interrelated issues that must be addressed to arrive at a coherent construction of an incumbent's duty to provide new entrants with access to network elements on an unbundled basis.

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